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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1278

CAROL MUSIC, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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OPINION BELOW

The United States Court of Appeals for the District of Columbia Circuit wrote no opinion. It merely issued an order of dismissal. Similarly, in refusing to set aside such dismissal, and denying reconsideration of such refusal, it merely entered an order, again without giving any opinion.

JURISDICTION

The order of the Court of Appeals, denying reconsideration of its refusal to set aside the dismissal of the appeal, was entered on February 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

The jurisdiction of the Court below to review the revocation order of the Federal Communications Commission is conferred by 47 U.S.C. 402 (b) (5).

QUESTION PRESENTED

Whether, either (A) in the exercise of its supervisory jurisdiction over the federal courts, or (B) as a matter of procedural due process, this Court should require reinstatement of an appeal, dismissed for procedural errors committed by counsel, where

(1) the record shows counsel was ill and his errors were so bizarre and persistent as plainly to indicate to any court or clerk of court that they were due to illness, mental confusion or other factors preventing normal functioning by counsel; and

(2) such court, without allowing oral argument and without written opinion, in apparent reliance on *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, refuses to reinstate the appeal, despite timely motion of new counsel certifying that the case involves issues that merit review.

STATEMENT OF THE CASE

On July 24, 1964, the Federal Communications Commission adopted a final decision revoking appellant's license to operate a radio station in Chicago, Illinois, for alleged infractions of its Rules (Tr. 100-102). Petition for reconsideration was denied on November 27, 1964. (Tr. 109-111).

Notice of appeal was duly filed on December 28, 1964. (Tr. 158). Former counsel, as a member of the bar of the Court below, duly entered his appearance on that date. (Tr. 11). At the time appellant employed him, said counsel "was a member of a law firm which had been highly recommended to appellant as attorneys experienced and skilled in the handling of litigation before the Federal Communications Commission and in this Court [the

United States Court of Appeals for the District of Columbia Circuit]." (Tr. 115).

On January 27, 1965, the Commission filed a certified Index to Record (Tr. 158).[1] Appellant's brief and joint appendix became due 40 days thereafter, on March 8, 1965.[2]

March 8, 1965 came and went without appellant's counsel filing either the brief or joint appendix, or any motion for an extension of time. Seventeen days later, on March 25, 1965, the Commission filed a motion to dismiss on the ground that appellant had failed to comply with Rule 18(a) and had "requested no extension of time in which to file." (Tr. 15-17).

Eighteen days later, on April 9, 1965, appellant's then counsel filed a "Reply to Motion to Dismiss." (Tr. 18-22) This included some six paragraphs of purported reasons for the delay. Present counsel is unable to understand the first five paragraphs so as to paraphrase them; they appear at Tr. 18-20. The sixth paragraph, *describing the illness of counsel*, read as follows: (Tr. 21)

> "Counsel for appellant, the undersigned, became seriously ill and was confined to Georgetown University Hospital for five days on one occasion and three on another and has been under medical care since late January by Dr. Elbert Phelps and other physicians for operative and other treatment. No other counsel were available to appellant. Counsel for appellee were advised of this situation and were aware that the typewritten record upon which they had stip-

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[1] Rule 37(b) of the Court of Appeals: "Within thirty days after the filing of an appeal, the Commission . . . in lieu of actually filing the record, shall file with the Court a certified list of all materials comprising the record . . ."

[2] Rule 18(a) of the Court of Appeals: "The appellent shall file 25 copies of his printed brief and joint appendix within 40 days . . . after the filing of the record on appeal."

ulated was delayed and correspondingly that brief date must be deferred."

With this Reply to Motion to Dismiss counsel filed a motion to enlarge the time to file appellant's brief and the joint appendix to May 9, 1965.[3]

On May 5, 1965, the Court of Appeals denied appellee's motion to dismiss and extended appellant's time for filing its brief to May 10, 1965, and for filing the Joint Appendix to May 17, 1965. (Tr. 25)

On May 13, 1965, a document entitled, "Brief for Appellant," was filed (Tr. 26-42). However, besides being three days late, this so-called "Brief" not only completely ignored six very specific Rules of the Court of Appeals as to form,[4] but, so far as intelligible at all, considered an aspect of the proceedings which, as pointed out by Appellee (Tr. 97, 98), "the Commission had specifically disclaimed . . . as a basis for its decision."

On May 17, 1965, the last day for filing a Joint Appendix, Appellant's counsel was again in default. On May 18, 1965, he filed a Motion (Tr. 43, 44) stating that "By reason of delay encountered by the printer, delivery of

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[3] The record shows the letter from counsel transmitting these motions dated April 2, 1965, but the Certificate of Service and court mail room stamp shows copies were not mailed to Commission counsel nor delivered to the Court until April 9th. (Supp Trans. 363) This discrepancy in dates is just another example of the inexplicable errors and confusions that kept recurring throughout the appeal.

[4] The Docket shows (1) only 7 copies were filed in lieu of the 25 copies required by Rule 18(a); (2) it was mimeographed contrary to the explicit prohibition of Rule 14 ("such printing may be done by ordinary typographic methods or by the process of multilith or offset duplicating (which, however, *does not include mimeographing*)"); (3) the so-called "Brief" contained no statement of Questions Presented (required by Rule 17(b)(1)); (4) no Index or Tables of cases (required by Rule 17(b)(3)); (5) no Statement of Points (Required by Rule 17(b)(7)); (6) and no Summary of Argument (Required by Rule 17(b)(8)).

the printed record cannot be completed for filing until Thursday, May 19, 1965," and "leave is prayed to permit filing on May 19, 1965."

However, on May 19, 1965, appellant's counsel, instead of filing a "Joint Appendix", as required by the Rules and the Court's order of May 5, 1965, tendered to the Clerk a 362-page document purporting to be "Appellant's Appendix." (Supp. Tr. 1-362).*

The Court thereupon on May 26, 1965, noting that the document tendered was not a Joint Appendix, denied the motion for leave to file a Joint Appendix late, "without prejudice to renewal for good cause shown." (Tr. 45) The Court noted that "appellant has lodged with the clerk an appendix and not a joint appendix as is required by Rule 16 of this Court." (Tr. 45).

Another month passed without further action by counsel. On June 30, 1965, the Clerk of the Court of Appeals wrote appellant's then counsel pointing out that "since May 26, 1965, this office has received no further motion in this matter, and accordingly there is no joint appendix filed in this case" (Supp. Tr. 364), and warning counsel that "If no response is received within 10 days from the date of this letter, the matter will be submitted to the Court for the issuance of an order to show cause why this appeal should not be dismissed." (Ibid.)

On July 10, 1965, counsel for appellant filed with the Clerk a letter (Supp. Tr. 365-367) complaining that counsel for the appellee had "neither submitted for consideration of appellant nor to the Court any portion of the record or designation of exhibits which it desired to have printed." Counsel stated he was "at a loss as to the correct pleading contemplated" (Supp. Tr. 365), and concluded:

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* The Supplemental Transcript (Supp. Tr.) includes this "Appellant's Appendix" and the Clerk's correspondence with former counsel.

> "I am prepared to submit whatever motion may be required to place this record in conformity with the rules of the Court but am not certain of the procedure available in these circumstances. I would appreciate your advice accordingly." (Supp. Tr. 367)

The Clerk did not give the advice requested. Instead, on August 17, 1965, the Court issued an order that appellant (Tr. 81)

> "show cause on or before August 30, 1965, why this appeal should not be dismissed for appellant's failure to comply with this court's order of May 5, 1965, which extended appellant's time, pursuant to his request, for the filing of a joint appendix."

Counsel advised the appellant that this show cause order had been issued. However, counsel made no suggestion to appellant that its appeal was in serious jeopardy. Rather, his letter merely stated that he was "obligated to answer the order of the Court and to seek its cooperation in compelling the Commission to supply the joint record." (Tr. 115) The appellant assumed from this explanation of his counsel that the order to show cause would be appropriately answered by August 30, 1965, the return date specified by the Court, so as to prevent dismissal of the appeal. (Tr. 115).

However, on September 1, 1965, when appellant's representative telephoned counsel to ascertain the status of the case, counsel advised that nothing had been done and that he was advised that the appeal would be dismissed. (Tr. 115, 116)

Appellant's representative thereupon came to Washington and on September 8, 1965 conferred with the Clerk of the Court of Appeals, who advised that "the Court might still allow the appeal to go forward if Rule 16 were promptly complied with." (Tr. 116). Appellant thereupon tried to employ another lawyer who advised against changing counsel so late in the appeal (Tr. 117).

The next day, September 9, 1965, appellant's representative contacted his counsel who agreed to meet with him before the Clerk of the Court of Appeals. At this meeting, the Clerk explained that what was needed was prompt compliance with Rule 16 and the Court's show cause order. (Tr. 117) Appellant's counsel thereupon stated in the presence of the Clerk that he would promptly do whatever was necessary to comply with Rule 16 and the Court's order (Tr. 117.)[5] On September 11, 1965, appellant was assured by his counsel that all necessary steps had been taken as promised and that an appropriate document had been served and filed. (Tr. 120)

In point of fact, counsel, contrary to his assurances, did not comply with Rule 16 and the Court's order. Instead, he filed a pleading entitled "Motion to Require Appellee to Show Cause for Failing to Comply with Rule 16(b) of this Court." (Tr. 152-155)

In this motion, counsel gave several excuses for his own past failures to comply with the rules, none of which appears intelligible[6] except the statement that "*illness* of counsel also delayed effective action." (Tr. 154) The motion concluded with the following undertaking:

> "Appellant and its counsel now agree to print and file any additional portions of the record required to comply with the requirements for a joint appendix, and to take any other action which the appellee may desire and the Court require to bring this appeal to

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[5] In a Motion to Enlarge Time to Show Cause filed the next day, September 10, 1965, counsel stated: "At the subsequent insistence of the client and after consultation with the Clerk of Court, it is believed that the motion to Show Cause and the commitments proposed in a Motion submitted herewith may permit correction of the technical status of the record so that disposition on the merits may be had." (Tr. 82)

[6] Their unintelligibility was stressed to the Court below in the Appellant's Motion for Reconsideration, Tr. 143 at 146, 147.

hearing, notwithstanding noncompliance with technical requirements of the rules."

"The rule to show cause is requested to require the appellee to cooperate in fulfilling the unsatisfied requirements."

The Clerk accepted this motion, despite its obvious inadequacy. Thereafter, on September 27, 1965, appellee filed a Motion to Dismiss (Tr. 88-99). This motion pointed out that the various pleadings filed by appellant's counsel "has misstated or, at least, ambiguously stated the events in this proceeding" (Tr. 91); that appellant had "consistently failed to comply with specific rules of this Court" (Tr. 91); "failed to comply with Rule 16(b) governing the form and contents of an appellant's brief" (Tr. 91, 93, 94); had not filed a joint appendix but a document entitled "Appellant's Appendix"; and that "prior to the filing of this document, appellant failed to serve the Commission with a statement of the parts of the record it proposed to print in the joint appendix as required by Rule 16(b) of this Court. Nor did appellant make any other effort to contact counsel for appellee on this matter" (Tr. 95).

The motion also pointed out that the brief filed by appellant's then counsel "embarks on a totally irrelevant discussion of the Commission policy with respect to" an aspect of the proceeding which the Commission "had specifically disclaimed . . . as a basis for its decision." (Tr. 97, 98) Counsel filed no opposition to this motion.

On November 4, 1965, the Court entered a per curiam order granting the appellee's motion to dismiss. (Tr. 113) Appellant's counsel then wrote appellant, enclosing a copy of the order and advising that he was terminating his representation of the appellant "as of October 31, 1965," (four days before the order of dismissal was entered). (Tr. 120).

Appellant thereupon employed its present counsel, who on November 18, 1965 filed a motion to set aside the

order of dismissal and reinstate the appeal. After reciting the above facts, the motion concluded:

> "Appellant submits that . . . . the failure to file a proper joint appendix and brief was not due to appellant's negligence but to factors beyond its control; and that in the interest of justice, the Court should set aside the order of dismissal and reinstate the appeal as requested herein so that appellant can have its day in Court on the merits of the case." (Tr. 121)

The motion requested that "in view of the peculiar circumstances of the case, if the Court has any doubts as to appellant's right to the relief herein prayed, oral argument be had on this motion." (Tr. 121)

The Court did not permit oral argument, and the motion, on January 4, 1966, was denied by a *per curiam* order (Tr. 142).

Appellant thereupon, on January 13, 1965, filed a motion for reconsideration. (Tr. 143-151.) This motion emphasized to the Court that the case involved "the delicate problems presented to a member of the bar and also to this Court where relief is sought on behalf of a client because of lapses in the prior handling of a case by another member of the bar which are so extreme (apparently because of illness) as to constitute, in effect, a denial to the client of its right to counsel." (Tr. 144.) The motion attached a statement of the questions that appellant's new counsel wished to argue on the merits. (Tr. 151.) Again, appellant asked for oral argument, but the motion, like the earlier one, was denied by a *per curiam* order, issued February 3, 1966, without oral argument being allowed and without any written opinion. (Tr. 156)

REASONS FOR ALLOWANCE OF THE WRIT

This case involves important questions, arising under *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, as to an appellant's right to relief from dismissal of an appeal (from a proceeding involving revocation of the appellant's right to do business), where dismissal was for procedural errors plainly due to illness, mental confusion or other factors preventing normal functioning of counsel.

The Court below denied relief presumably on the basis of the *Link* case, since this was the sole authority cited and relied on by the Commission in opposing reinstatement of the appeal. (Tr. 131, at p. 132). But, in *Link* there was no suggestion that counsel's failure to attend the pretrial conference, resulting in dismissal, was due to abnormal factors. Here, on the other hand, the record showed counsel was ill and the violations by counsel were so glaring and bizarre as to be obviously due to illness, mental confusion or other factors preventing normal functioning. Furthermore, in *Link* there was no timely motion for relief to show that "counsel's failure to attend the pretrial conference was other than deliberate or the product of neglect" (370 U.S. at 635), while here there was such a timely motion. Accordingly, the Court below erred in applying *Link* to the facts of the present case.[7]

Furthermore, to apply *Link* to a case like this raises a serious due process question under the Fifth Amendment. For the right to counsel contemplates representation "reasonably likely to render and rendering effective assistance", *McKenna* v. *Ellis*, 280 F. 2d 592 (5th Cir. 1960); and due process is denied if the representation provided is of "such a low caliber as to amount to no

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[7] Even the majority opinion of Justice Harlan emphasized that *Link* was "not a case in which failure to comply with a Court order 'was due to inability fostered neither by . . . [petitioner's] own conduct nor by circumstances within its control.'" (370 U.S. at 636)

representation at all." *People* v. *DiSimone* 9 Ill. 2d 522; 138 N.E. 2d 556. Refusal of the Court below, on timely motion, to allow new counsel to correct the prior procedural errors and file a proper brief addressed to the real merits, violated the principle that "if in *any* case, *civil* or *criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell* v. *Alabama*, 287 U.S. 45, at 69.

If, despite these distinctions, *Link* is still deemed to preclude relief, it should be reconsidered and overruled, in terms of both legal theory and judicial policy.

As to legal theory, *Link* merely relied on the general rule that a principal is liable for the acts, and bound by the knowledge, of his agent or attorney. But none of the rationale that normally justify this rule applies here. There was no "holding out" to the Court that the attorney was "competent and to be trusted," which is one frequent rationale for liability. Nor was there action by the principal "putting it in the power" of the attorney to do wrong, which is a second common rationale. Nor was there any element of estoppel caused by action in reliance by the Court or appellee, which is the third usual rationale of liability. Indeed, the situation seems somewhat like that in which exemplary damages are sought against a principal, where this Court has denied liability unless the principal actually participated in the tort. *Lake Shore & Michigan Railway Co.* v. *Prentice*, 147 U.S. 101 (1893). Accordingly, in terms of legal theory alone, *Link* should be reconsidered and overruled.

In terms of judicial policy, the reasons for reconsidering and overruling *Link* are equally strong. The appropriate remedy in a *Link* situation is not to penalize the client, but to impose appropriate disciplinary sanctions

against the attorney, simultaneously warning the client to retain other counsel or proceed at his jeopardy with delinquent counsel. If such warning is not given, then the court must on timely motion permit the counsel's errors to be corrected, unless, of course, estoppel intervenes because of changes in position in reliance on the errors.

The general importance of this issue to the administration of justice in the federal courts, both appellate and nisi prius, seems obvious, so as to warrant allowing the writ.

ARGUMENT

A. Aside From Any Constitutional Due Process Issue, Minimal Standards of Judicial Fairness Required Reinstatement of the Appeal.

This Court, of course, has inherent supervisory jurisdiction over the federal courts to assure that

> "the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." [8]

Here, the procedural errors of counsel were so flagrant and bizarre that the Clerk of the Court of Appeals, and, hence the Court itself, were charged with notice, quite early in the appeal proceedings, that there was something radically abnormal with the representation that appellant was receiving from an ostensibly qualified member of the bar of that Court.

1. *The Procedural Errors Were Obviously Due to Illness, Mental Confusion or Other Abnormal Factors Affecting Counsel's Performance.*

As set forth in the Statement of the Case, *supra* pp. 2-9, appellant's counsel was in continuous violation of the pro-

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[8] Communist Party v. Subversive Activities Control Board, 351 U.S. 115 at p. 124.

cedural rules of the Court of Appeals beginning on March 8, 1965, when counsel first failed to file the brief and joint appendix then due. These violations were glaring and bizarre. Counsel had revealed that he had been "seriously ill." (Tr. 21, 154) The so-called "brief" that was filed not only violated six explicit procedural rules but, incredible as it may seem, dealt with a matter the Commission had explicitly disclaimed as a basis for decision.[9] And, to compound these errors, counsel, instead of filing a joint appendix, tendered a procedural invention of his own, i.e., an "Appellant's Appendix." When warned that a joint appendix was needed, counsel wrote he was "at a loss as to the correct pleading contemplated" (Tr. 365), was "not certain of the procedure available" and asked the Clerk's "advice". (Tr. 367) When this plea was ignored and a show cause order issued by the Court, counsel failed to answer it. Then, after the client arranged a meeting with the Clerk to straighten out the procedure, counsel still did nothing but tender a motion on September 10, 1965, that was clearly unresponsive. (Tr. 152)

Plainly, these were no deliberate or negligent defaults by otherwise competent counsel. It was obvious merely from the papers filed, and especially the September 10 motion (Tr. 152-155), that the Court and its Clerk were dealing with a quite abnormal situation. Yet the Clerk on September 13 accepted the September 10 motion, treating the case as though normal legal representation was being rendered, and on November 4, 1965, the Court dismissed the appeal.[10]

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[9] The appellee so characterized the brief in its motion to dismiss. (Tr. 97, 98). The rule violations are set out *supra*, note 4.

[10] The appellee meanwhile had filed a motion to dismiss on September 28, 1965. Consistent with his prior performance, appellant's counsel filed no opposition to this motion; this incredible failure to oppose the motion to dismiss was just one final evidence that the situation was completely abnormal.

2. ***Because of Counsel's Abnormal Functioning, the Link Decision Should Not Have Been Applied By the Court Below.***

In the *Link* case, even the majority opinion emphasized that (370 U.S. at 635):

> "this is not a case in which failure to comply with a court order 'was due to inability fostered neither by * * * [petitioners] own conduct nor by circumstances within its control.' Societe Internationale Et Commercials, S.A. v. Rogers, 357 U.S. 197."

In addition, the majority stated:

> "Nor need we consider whether the District Court would have been abusing its discretion had it rejected a motion under Rule 60(b), which was accompanied by a more adequate explanation for the absence of petitioner's counsel from the pretrial conference. No such motion was ever made, so that there is nothing in the record before us to indicate that counsel's failure to attend the pretrial was other than deliberate or the product of neglect."

Here, on the other hand, there was not only a timely motion to reinstate the appeal, but the evidence of abnormal representation by counsel rang out "loud and clear" from the record of the proceedings and from the correspondence in the Court's files between the Clerk and counsel for appellant. Accordingly, it was plain error for the Court below to follow *Link* and deny appellant's timely motion, through new counsel, to reinstate its appeal.

Certainly, it was apparent to the Clerk, and therefore to the Court, that *for a period of at least six months a member of the Court's own bar who was ill was jeopardizing an appellant's rights because of an obvious and indeed confessed inability to understand and follow the rules of procedure of that Court.* Yet, despite such knowledge, the Clerk continued to deal with such counsel as though he were functioning normally. Indeed, the Clerk met with

such counsel as late as September 9, 1965, together with the client's representative, and dealt with him as a member in good standing of the bar of the Court; and on September 13, 1965, the Clerk accepted without objection an obviously inadequate pleading tendered by such counsel on September 10, 1965.

Under these circumstances, fair procedure required that the resulting dismissal order of November 4, 1965, be set aside on timely motion.[11]

B. To Apply Link v. Wabash Railroad Company Here Would Be a Denial of Due Process.

It is settled constitutional doctrine that not only is a defendant in a criminal proceeding entitled to counsel (*Gideon* v. *Wainwright*, 372 U.S. 335) but such counsel must be "reasonably likely to render *and rendering* reasonably effective assistance." *McKenna* v. *Ellis*, 280 F. 2d 592 at p. 599 (5th Cir.). Accordingly, due process is denied when counsel's representation is "of such a low caliber as to amount to no representation." [12]

That a litigant can afford to pay counsel, or that the proceeding is civil rather than criminal, should not lessen

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[11] In *Theard* v. *United States*, 354 U.S. 278, this Court described the power of disbarment as necessary to *protect the public* by eliminating "the implied representation by courts that a man who is allowed to hold himself out to practice before them is in 'good standing' so to do." (p. 281) By the same token, if a Court, or its Clerk, knows that a lawyer is performing abnormally, but nevertheless deals with him in the client's presence, as though he were functioning normally, there is a special duty not to penalize that client for the counsel's abnormal performance. The Court below has stringent criteria for practitioners before it. Rules 7 and 7½.

[12] *People* v. *Di Simone* 9 Ill. 2d 522, at 524; 138 N.E. 2d 556, at 557. Such "low caliber" can be due to: youth, *McKenna* v. *Ellis*, 280 F. 2d 592; intoxication, *State* v. *Keller*, 57 N.D. 645, 223 N.W. 698; illness, *In re Hilgermann's Estate*, 208 Wis. 520, 243 N.W. 753; or simply unexplained incompetence, *Wilson* v. *State*, 222 Ind. 63, 51 N.E. 2d 848.

his right to a minimum of competence. Due process requires that every litigant have its day in court, assuming there is no element of estoppel in favor of the opposing party. Refusal of the Court below, on timely motion, to permit new counsel to correct the prior errors and file a brief addressed to the real merits, violated the principle that "if in any case, *civil* or *criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." [13]

C. If Link v. Wabash Railroad Company Precludes Relief, It Should be Reconsidered and Overruled.

If despite the foregoing, *Link* is deemed applicable, it should be reconsidered and overruled, both as a matter of legal theory and of judicial policy.

In terms of legal theory, *Link* relied merely on the ordinary rule that a principal is bound by notice to, and the acts of, his agent.[14] But the various rationale that ordinarily justify this rule are not really relevant to a lawyer-client relationship such as was involved in *Link* and the case at bar.

Thus, one important rationale for liability is that "the principal holds out his agent as competent and fit to be trusted, and thereby in effect warrants his fidelity and

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[13] *Powell* v. *Alabama*, 287 U.S. 45, at 69; *Chandler* v. *Fretag*, 348 U.S. 3, at 5; *Reynolds* v. *Cochran*, 365 U.S. 525 at 530, 531.

[14] The majority cited as its main authority *Smith* v. *Ayer*, 101 U.S. 320. That case merely held that a pledgee of notes is charged with notice of facts given to the attorney who handles the transactions for the pledgee. The Court said (pp. 325, 326) "The facts brought to the knowledge of their attorney in his inquiries respecting the notes and the authority by Benjamin T. Renick to pledge it are considered in law as brought to their knowledge."

good conduct in all matters within the scope of his agency" [15]; and a second rationale is that "where a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it in his power to do the wrong, rather than by a stranger." *Macon County* v. *Shores*, 97 U.S. 272.

If *Link*, as applied to the facts of the instant case, is reexamined in light of either of these two rationale for principal-agent liability, it is apparent that Justice Black's position in his dissent [16] was eminently sound.

Thus, the "holding out" rationale is obviously inapposite. For the client can scarcely be deemed to have misled the court by holding out as "competent and fit to be trusted" a member of the Court's bar whose inadequacies have been revealed to the Court itself by his very actions in the case. Equally inapplicable is the rationale that the principal "put it into the power" of the agent to do the wrong. For, it is the Court—not the client—that "put it into the power" of counsel to mishandle the case by allowing him to continue after his ineptness had been repeatedly demonstrated and after he had, in so many words, confessed his ignorance of how to correct the errors he had already committed.

Indeed, the situation seems somewhat like that in which exemplary damages are sought against a principal, where this Court has denied liability unless the principal

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[15] 3 Am. Jur. 2d, *Agency* § 261; *Stewart* v. *Brooklyn & C.T.R. Co.* 90 N.Y. 588; *Biggers* v. *First Nat. Bank* (Tex. Civ. App) 29 S.W. 2d 841.

[16] *Link* v. *Wabash Railroad Co. ibid*, at p. 645: "One may readily accept the statement that there are circumstances under which a client is responsible for the acts or omissions of his attorney. But it stretches this generalized statement too far to say that he must always do that. This case is a good illustration of the deplorable kind of injustice that can come from the acceptance of any such mechanical rule."

actually participated in the tort.[17] In such a case, "Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender, and as a warning to others, can only be awarded against one who has participated in the offense." [18] By the same token, it is the lawyer, not the client, who, in a *Link* situation, should be disciplined for rule infractions, in which the client did not actively participate, and which are so technical as to be the clear responsibility of the lawyer rather than the client.

Of course, if the opposing party changes its position in reliance upon such rule violations by the attorney, the element of estoppel may require holding the client responsible for the misconduct of the attorney. 3 Am. Jur. 2d *Agency*, Sec. 76; *Bronson's Executor* v. *Chappell* (Townsend v. Chappell) 12 Wall (79 U.S.) 681; *Calais S. B. Co.* v. *Scudder*, 2 Black (67 U.S.) 372. But, absent such an element of estoppel, *Link* as a matter of legal theory was plainly wrong in holding that the law of agency required denial of relief to a client for his lawyer's procedural delinquencies.[19]

Link is equally wrong as a matter of judicial policy. The appropriate action in a *Link* situation is *not to penalize the client*, but to impose various degrees of disciplinary action *on the attorney*, and, where feasible, simultaneously warn the client to get other counsel or otherwise protect himself. Such disciplinary steps have, indeed, been taken by various trial courts which were not inhibited, as were the courts in *Link*, by the supposed

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[17] *Lake Shore & Michigan Railway Co.* v. *Prentice*, 147 U.S. 101.

[18] Ibid, at p. 107.

[19] To bind a principal for unauthorized acts of the agent it must appear that "the third person, relying on such appearance of authority, has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal." 3 Am. Jur. *Agency* § 75, and cases cited.

obstacle of the rule of principal-agent liability.[20] An effective range of disciplinary steps, beyond the imposition of costs,[21] would be "(1) a reprimand by the court, (2) a finding of contempt, or (3) a prohibition against practicing for a limited time before the Court whose order was neglected or disregarded." [22]

How much more constructive would such an approach have been in the instant case, particularly if coupled with a procedure by which the client would have been directly notified so it could promptly employ new counsel. By such procedure, not only would the harsh result to the appellant have been avoided, but the court and the public both protected against a recurrence of similar lapses.[23] As recently stated by Justice Black:

> "It seems to me to be an uncivilized practice to punish clients by throwing their cases out of court because of their lawyer's conduct. It may be supportable by good, sound, formal logic but I think has no support whatever in a procedural system supposed to work as far as humanly possible to the end of obtaining equal and exact justice." [24]

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[20] *United Sheeplined Clothing Co.* v. *Arctic Fur Cap Corp.*, 165 F. Supp. 193 (S.D. N.Y. 1958) default judgment against the client refused but the attorney was required to pay costs and attorney fee to the opposing party. See also *Osolin* v. *S.S. Colorado*, 1 Fed. Rules Serv. 2d 37a.22, Case 1(a) (N.D. Cal. July 7, 1958); *Austin Theatre, Inc.* v. *Warner Bros. Pictures, Inc.* 22 F.R.D. 302 (S.D. N.Y. 1958); *Allen* v. *U.S.*, 16 Fed. Rules Serv. 37b.21, case 1 (E.D. Pa. May 21, 1951).

[21] Costs were imposed on the attorney in many of the cases cited in footnote 20.

[22] This approach is suggested in a Comment on the *Link* case entitled "Dismissal For Failure to Attend a Pretrial Conference And the Use of Sanctions at Preparatory Stages of Litigation," 72 Yale Law J. 819, 830 (1963).

[23] Such approach would be similar to that urged by Justice Black in his recent dissent to the Report on Amendments to the Rules of Civil Procedure, 249 F. Supp. 204 at 207 (1966).

[24] Ibid, at p. 208.

This is particularly true where, as here, the record shows counsel was ill and his lapses were so flagrant and bizzare as plainly to indicate to any Court or Clerk of Court that they must have been due to illness, mental confusion or other abnormal factors, and there is no element of estoppel to require denying the client its day in court.

CONCLUSION

The issue in this case is whether the doctrine of *Link*, supra, must be, and constitutionally may be, applied to charge a client with errors of his counsel that are obviously due to illness, mental confusion or other abnormal factors, where there is no element of estoppel. If *Link* must, and may be, so applied, then the alternative issue is whether *Link* should itself be reconsidered and overruled. Both issues involve obviously important problems for the administration of justice in the federal courts, both appellate and nisi prius, so as to warrant a grant of the writ of certiorari.

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May 3, 1966.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1965

(United States Court of Appeals for the District of Columbia Circuit, Filed Nov. 4, 1965, Nathan J. Paulson, Clerk)

No. 19,089

CAROL MUSIC, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

BEFORE: DANAHER, WRIGHT and MCGOWAN, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's motion to enlarge time to respond to this court's order of August 17, 1965 to show cause why this appeal should not be dismissed; of appellant's motion to require appellee to show cause for failure to comply with Rule 16(b) of the General Rules of this Court and of appellee's motion to dismiss, it is

ORDERED by the court that appellant's aforesaid motions are denied, and it is

FURTHER ORDERED by the court that appellee's motion to dismiss be granted and this appeal is dismissed.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1965

(United States Court of Appeals for the District of Columbia Circuit, Filed Jan. 4, 1966, Nathan J. Paulson, Clerk)

No. 19,089

CAROL MUSIC, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

BEFORE: DANAHER, WRIGHT and MCGOWAN, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's motion to stay issuance of certificate of order, to reconsider and set aside order of dismissal and reinstate appeal and for further relief, of appellee's opposition thereto, and appellant's reply, it is

ORDERED by the court that appellant's aforesaid motion is denied.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1965

(United States Court of Appeals for the District of Columbia Circuit, Filed Feb. 3, 1966, Nathan J. Paulson, Clerk)

No. 19,089

CAROL MUSIC, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

BEFORE: DANAHER, WRIGHT and MCGOWAN, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's motion for reconsideration of this court's order of January 4, 1966, which order denied appellant's motion to set aside the order of November 4, 1965, dismissing this appeal and for oral argument, it is

ORDERED by the court that appellant's aforesaid motion for reconsideration and for oral argument is denied.

Per Curiam

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1278

CAROL MUSIC, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

After an evidentiary hearing, the Federal Communications Commission on July 27, 1964, revoked the license and subsidiary communications authorizations of Carol Music, Inc., for FM broadcast station WCLM, Chicago, Illinois (R. 100–102). The ground of the Commission's action was that Carol Music had engaged in serious misconduct which demonstrated its unfitness to be a broadcast licensee. Specifically, it had refused to file with the Commission copies of agreements and other information regarding the operation of its radio facilities required by the Communications Act and the Commission's Rules (R.

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101); the uses to which Carol Music had put both its main channel and its sub-carrier frequency departed substantially from the uses it had proposed in its application for renewal of license (R. 101); these proposals had been submitted in bad faith, and for the purpose of misleading the Commission (R. 101); and Carol Music had relinquished effective control over substantial portions of the programs broadcast over the facilities of station WCLM, in violation of the Communications Act and of the Commission's Rules (R. 101).

On December 28, 1964, petitioner appealed to the Court of Appeals for the District of Columbia Circuit (R. 1). Its counsel persistently disregarded the rules of that court, however, particularly with respect to the filing of the Joint Appendix (Pet. 2–9). After prolonged delays, extensions, and defaults (R. 12, 14, 18, 23, 25, 43, 45), the court on August 17, 1965, ordered petitioner to show cause why the appeal should not be dismissed (R. 81). The order was not answered (Pet. 6).

On September 8, 1965, at the request of Carol Music's Chicago counsel (R. 126), a Washington attorney reviewed the case with Carol Music's court of appeals counsel (R. 116, 126). The latter complained, among other things, that Carol Music had not paid him all that was owing to him (R. 126–128). Retention of substitute or additional counsel was discussed with another Washington firm specializing in Federal Communications Commission practice (R. 117, 127–128), but the firm recommended against a change of counsel at that time (R. 117).

Petitioner's representative and its appeal counsel also met with the Clerk of the Court of Appeals (R. 117). The Clerk advised them that the court might still allow the appeal if a proper Joint Appendix was filed (R. 116–117), but nothing was done, and on November 4, 1965 a unanimous panel of the court granted the Commission's motion to dismiss the appeal (R. 113).

Petitioner then retained new counsel, who filed two successive motions to reinstate the appeal (R. 114, 129, 143). The second suggested that the failure to comply with the court's rules might be due to abnormal behavior (caused by illness) of petitioner's former counsel (R. 144). No evidence supporting this suggestion was submitted to the court, however, and the motion was denied on February 3, 1966 (R. 156). The present petition for certiorari, which asks this Court to review the court of appeals' refusal to reinstate the appeal, followed.

Petitioner contends that the court of appeals should have found that its appeal counsel was behaving so abnormally as to deny petitioner its right of counsel. But the only evidence petitioner points to in support of this contention is the failure of counsel to comply with the court of appeals' rules, and the form and content of the papers he filed; no direct evidence concerning counsel's mental health was offered. As to the failure to file the Joint Appendix, the record indicates that the most persistent reasons offered were financial (R. 19–20, 82, 85–86; Supp. R. 366–367); as to the quality of counsel's work product, we do not think it was such as to warrant an inference of mental in-

capacity. In addition, we note that petitioner had the benefit of professional advice on this case from two other Washington law firms, as well as its Chicago counsel.

The court of appeals afforded petitioner all reasonable opportunity to perfect its appeal and present its case on the merits. The court was not required to permit its rules of procedure to be ignored, and the proceeding protracted,[1] indefinitely. See, *e.g., Link* v. *Wabash Railroad Co.*, 370 U.S. 626; *Tucker Products Corp.* v. *Helms,* 171 F. 2d 126 (C.A. 9), certiorari denied, 336 U.S. 938; *United States* v. *Bowen*, 306 F. 2d 620 (C.A. 5), opinion adhered to on rehearing, 310 F. 2d 45. And, certainly, the court below was in the best position to determine whether, on the basis of a charge of mental unfitness against a member of its bar, petitioner was entitled to have the case reopened. Its determination was reasonable and does not warrant further review. The petition for certiorari should therefore be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

HENRY GELLER,
General Counsel,
Federal Communications Commission.

MAY 1966.

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[1] Although the order revoking petitioner's broadcast license was entered on July 27, 1964, petitioner is free under the Commission's ruling to continue to broadcast until the final conclusion of the judicial review proceeding.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1278

CAROL MUSIC, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1278

CAROL MUSIC, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

REPLY BRIEF FOR PETITIONER

Respondent asks that certiorari be denied on the theory that the question below was merely a narrow factual psychiatric issue as to a particular lawyer's mental health, which this Court, of course, would have no interest in reviewing.

The reply to this contention is two-fold.

First, the issue here is not a psychiatric but a legal question: whether even the majority decision in *Link* applies where the errors of counsel were

> "so bizarre and persistent as *plainly to indicate* to any court or clerk of court that they were due to illness, mental confusion *or other factors preventing normal functioning.*" [1]

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[1] See Petition, p. 2: Question Presented

To appraise this issue it suffices merely to read the weird saga, summarized on pages 2 to 8 of the Petition, of counsel's rule infractions, late filings, unintelligible explanations, irrelevant arguments, and inability (confessed by letter to the Clerk) to understand how to comply with the Court's printed rules. These errors, we submit, were so extreme that they could not be accepted by any justice of the peace court, let alone a United States Court of Appeals, as normal behaviour of a member in good standing of the bar of the Court.

Respondent brushes aside the tragic recital of errors, delays, and confusions by saying "we do not think it was such as to warrant an inference of mental incapacity." That, of course, is not the issue, but rather whether the performance was, on its face, so persistently bizarre for a member of the bar of a Federal Court of Appeals as to be explicable only on the ground of *some* form of abnormality.[2]

The alternative, of course, would have been for new counsel to charge prior counsel simply with utter incompetence, even though he was a member in good standing of the bar of the Court. But this would have been not only a slight on the Court but also cruelly callous in view of the record evidence of prior counsel's serious illness

[2] Rather than squarely meet the issue of the egregious behavior of counsel of record, Respondent seems to suggest that regardless of how incompetent appeal counsel may have been, petitioner had "the benefit of professional advice from two other Washington law firms, as well as its Chicago counsel." But this is not so. When petitioner approached other counsel on September 8, 1965, such counsel advised "that at that stage of the case the then counsel of record was the person who could most readily straighten out the procedural situation . . ." Certainly petitioner should not be penalized for following this advice and returning with his counsel of record to confer with the Clerk on September 9, 1965, with the expectation that counsel would, as he assured the Clerk, take the steps outlined by the Clerk to avoid dismissal of the appeal. (Tr. 117).

occurring precisely at the time the appeal was taken.[3] For, in either case, the legal conclusion on this record would have to be the same, that counsel's representation was "of such a low caliber as to amount to no representation."[4]

Under these circumstances we are confident that the Court below would have reinstated the appeal, had it not felt restrained by the majority opinion in *Link*. Presumably it shared the Respondent's view that *Link* was controlling, short only of actual psychiatric proof of mental incapacity. Such an interpretation of *Link*, while we think unnecessary,[5] is perhaps understandable in view of the very broad dictum laid down by the majority and which Respondent had urged on the Court in opposing reinstatement of the appeal.[6]

Second, even if the Court disagrees that the errors here *per se* evidence such abnormality (or utter incompetence) as to make counsel's representation "of such low caliber as to amount to no representation at all," certiorari should be granted to at least clarify, if not overrule, the *Link* doctrine.

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[3] Tr. 21, 154, quoted in Petition pp 3, 7.

[4] See discussion in Petition pp 14, 15, 16.

[5] See discussion in Petition, pp 14, 15.

[6] Tr. 132 where Respondent quoted to the Court only the following excerpt from *Link* v. *Wabash Railroad Company*, 370 U.S. 632, 633-634.

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' Smith v. Ayer, 101 U.S. 320, 326, 25 L.Ed. 955." (Footnote omitted).

For, we doubt that even the majority intended that a client should be penalized for errors of counsel as egregious and bizarre as those shown by the present record. (See discussion in Petition, pp. 14, 15). In addition, there appear to be strong arguments, both in legal theory and judicial policy, for the minority view in *Link*. (See discussion in Petition, p. 16-20) Decided by a bare 4 to 3 vote of the Court, *Link* involves an issue sufficiently important to the administration of justice, in both the appellate and nisi prius courts, to warrant reconsideration and, at the very least, clarification by a full court.

Respectfuly submitted,

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May 1966